Filed 2/22/19 P. v. Rodriguez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JORGE LUIS RODRIGUEZ, Defendant and Appellant.	B288312 (Los Angeles County Super. Ct. No. NA102101)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jorge Rodriguez (Rodriguez)[1] of first degree murder (Pen. Code,[2] § 187), and found true the allegation that Rodriguez personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The trial court sentenced Rodriguez to a total term of 50 years to life in state prison.

On appeal, Rodriguez contends the trial court erred by: (1) failing to make an adequate inquiry into prospective juror bias or prejudice; (2) admitting statements Rodriguez made to undercover agents while in jail; and (3) failing to instruct the jury on heat of passion voluntary manslaughter. Rodriguez further contends these errors accumulated so as to deprive him of his right to a fair trial.

We conclude that the trial court's inquiry of prospective jurors was adequate under the circumstances, that Rodriguez waived his challenges to the admission of jailhouse statements by failing to litigate the issues in the trial court, and that no prejudicial error resulted from the omission of the heat of passion instruction—thereby leaving no errors to accumulate.

Rodriguez asks us to strike from the abstract of judgment the imposition of 10 percent interest on the stipulated amount of victim restitution because the trial court did not mention interest in orally pronouncing sentence. We decline to do so because interest on victim restitution is mandatory, and a sentence excluding interest on victim restitution would be unauthorized. We thus modify the

---

[1] It is unclear from the trial record whether defendant's legal name is "Jorge Luis Rodriguez" or "Jorge Luis Rodriguez Cruz." Consistent with the final abstract of judgment—and this court's docket—we will use Rodriguez as the surname.

[2] Undesignated statutory citations are to the Penal Code.

judgment to include 10 percent interest on the amount of victim restitution. We further exercise our corrective authority to strike 140 days of conduct credit prohibited by law.

We affirm the judgment as modified.

FACTS AND PROCEEDINGS BELOW

A. Prosecution Evidence

1. The shooting

On June 22, 2015, around 8:45 a.m., Rodriguez was standing in an alleyway in Long Beach, talking with Dominique Alvarez[3] and A.P., who lived nearby. Rodriguez had been out the night before, partying and drinking, and was still somewhat intoxicated.

While Rodriguez and the women were standing in the alley, Douglas Wilson (Wilson) stepped out of his nearby apartment building. As Wilson walked past the entrance to the alley, Rodriguez said, " 'Look at this fool thinking he is all hard,' " in a voice loud enough for Wilson to hear the remark.

Wilson replied, " 'What fool? What did you say?' " He added, " 'With all due respect, I am tired of this. I'm tired of this bullshit.' " He gestured as though he wanted to fight Rodriguez, and said, " 'come on.' "

The women tried to diffuse the situation, with Alvarez testifying that she told Wilson, "[j]ust ignore him . . . I'm sorry, just ignore," while A.P. tried to restrain Wilson.

Rodriguez put his hand on his belt, indicating that he had a gun, and smirked. Wilson said, " 'I got one of those, but I don't need

---

[3] Alvarez was deceased at the time of trial. Her preliminary hearing testimony, provided under a grant of immunity, was read into the record at trial.

one.' "[4] Wilson then stepped back and took off his shirt to show Rodriguez he didn't have a firearm and just "wanted to fight him."

Rodriguez pulled out his gun and Wilson stepped back. Rodriguez shot Wilson twice: once in the stomach, and once in the chest. Wilson fell down and yelled out, "Help me. Help me." While Wilson was on the ground, Rodriguez shot him two more times, including one shot in the back.

Rodriguez, A.P., and Alvarez fled. A nurse happened by a few minutes later and found Wilson still breathing. She called 911 and tried to help Wilson until paramedics could arrive, eventually performing CPR before Wilson died.

2. Witness 911 calls

Several witnesses called 911 to report the shooting.

Jose O. had been walking his dog past the other end of the alley, about 170 feet away, while Maria G. was looking out of her apartment window less than 25 feet away.

Jose O. saw a black man taking off his shirt and gesturing with his hands as if he wanted to fight. One of the women was holding down Rodriguez's hands and Jose O. could see that Rodriguez was holding something. Rodriguez pushed one of the women away so hard that she fell back towards a trash bin, and then fired two shots at Wilson from about four feet away. Wilson grabbed his stomach and said, "Help me. Help me." Rodriguez shot him twice more, with his arm lowered at a 45-degree angle as he fired.

---

[4] Though Alvarez testified to hearing this statement, in her initial statement to police she only reported hearing the first clause but not the second. A.P. testified at trial she heard Wilson say, "I don't give a fuck. I have one of those too."

Maria G. heard people arguing and looked out the window to see a black man taking off his shirt, and "gesturing as if he wanted to fight." Three people were speaking in a loud tone to the man, but she could not understand their words because she does not speak English. She then saw Rodriguez take out a gun and shoot the man. The entire altercation took just seconds.

3. Autopsy report

An autopsy performed on Wilson revealed four gunshot wounds: one in the central chest, one in the abdomen, one in the lower left back, and one on the top of the right inner arm. The range of all four shots was indeterminate, as none of the wounds showed the sort of stippling or soot associated a range of under three feet.

4. Arrest of Rodriguez

About five weeks after the shooting, Long Beach police effectuated a traffic stop of a car in which Rodriguez was a passenger. When the officer approached, Rodriguez jumped out of the car and ran away. After speaking with the driver, the officer learned Rodriguez was a murder suspect and called for backup.

Police established a perimeter around the area and located Rodriguez in an apartment complex. After refusing to surrender, Rodriguez was shot with a rubber bullet and taken into custody. Rodriguez was taken to a hospital, cleared for release, and then transported to a city jail.

5. Recorded jailhouse conversation

The day after his arrest, Rodriguez was placed in a holding cell with two confidential informants. An edited recording of Rodriguez's conversation with informants was played for the jury.

Rodriguez stated that the person who died was black, stated "I shot him" and that "he went flying with the first [shot]." Rodriguez admitted he shot the victim "when he was screaming" and stated that he then "just walked, . . . got out and walked away real smooth." Rodriguez told informants that after the killing, "I didn't feel anything, fuck it," and "I just had no feelings toward it."

In that same conversation, Rodriguez stated he had "problems with that Black dude in the past," that "the other time he caught me empty handed," and "the first time he came up on me he had a gun." Regarding the investigation into the shooting, Rodriguez stated, "[t]hey don't got shit. [¶] . . . [¶] Everything's gone."

Detective Oscar Valenzuela, who helped coordinate the recorded jail cell conversation, testified that he had reviewed two police reports in which Rodriguez had previously reported being victimized. On one occasion, Rodriguez had been shot at, and on another occasion a person had pointed a gun at him.[5]

6. Gang evidence[6]

Dominique Alvarez testified that her boyfriend, Frank Velasquez, is a member of the Barrio Pobre gang, and that

---

[5] Both reports were filed in 2007 and were briefly referenced during the gang-related testimony; there was no indication or testimony that these reports involved the victim in the instant shooting. The reports were again referenced in relation to defense counsel's expert witness Dr. Kevin Booker, who testified that such experiences could result in trauma and a state of hypervigilance during future encounters.

[6] Though the jury found the gang allegation not true, the parties include a brief synopsis of the gang evidence. We include it here to the extent any of the gang testimony may have intersected with Rodriguez's imperfect self-defense claim.

she believed Rodriguez was also a member of that gang, who went by the nickname "Rowdy." Police testified that Rodriguez is a member of Barrio Pobre.

In statements made in custody, Rodriguez stated that he was "from BP." Barrio Pobre does not get along with black gangs. Wilson, however, was not a gang member.

B. Defense Evidence

A.P. testified Rodriguez seemed drunk before the shooting.[7] She agreed Rodriguez called out to Wilson, Wilson confronted Rodriguez, and Rodriguez then shot Wilson. After the shooting Rodriguez "sobered up really fast and was very scared and didn't know what the hell to do and . . . didn't know what just happened." She thought that Wilson was more muscular than Rodriguez. A.P. had never heard Rodriguez make "derogatory statements towards African-Americans."

Martin Flores testified as a defense gang expert. He stated that newly incarcerated individuals sometimes try to boast and make themselves seem more dangerous than they really are.

Dr. Kevin Booker, a clinical psychologist with expertise in trauma, testified that experiences of past trauma can increase vigilance and make a person more susceptible to engage in fight-or-flight reactions.

C. Rebuttal Evidence

In a recorded jailhouse conversation between A.P. and Rodriguez, which took place during trial, A.P. told Rodriguez that she was "not saying anything" and "not gonna say nothing . . . . I'm not stupid."

---

[7] A.P. had multiple moral turpitude convictions.

D. Charges and Jury Verdict

Rodriguez was charged with first degree murder (§ 187), with allegations that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)), and that Rodriguez personally discharged a firearm causing death (§ 12022.53, subd. (d)).

The jury convicted Rodriguez of first degree murder and found true the firearm-use allegation; the jury found the gang allegation not true.

The trial court sentenced Rodriguez to a total term of 50 years to life in state prison: 25 years to life for the murder, plus 25 years to life for the firearm enhancement.

DISCUSSION

I. Adequacy of Trial Court's Inquiry into Prospective Juror Bias or Prejudice

Rodriguez contends the trial court failed to conduct an adequate inquiry after learning that the victim's mother spoke to a prospective juror. This, according to Rodriguez, resulted in a presumption of prejudice which was not dispelled. We disagree.

A. Relevant Facts

On the third day of jury selection, Prospective Juror No. 18 asked to speak privately with the court. Once outside the presence of the jury pool, he told the court: "[T]he woman [who had been sitting] on the side of me said it is her son that was murdered."

The prosecutor said, "Oh, my gosh. She's sitting there in the audience in the middle with everybody."

Prospective Juror No. 18 then explained that victim Wilson's mother came into the courtroom after lunch and sat beside him.

She initially said nothing, but shortly before the court called the next group of jurors, which included Prospective Juror No. 18, Wilson's mother said, "[t]hat was my son that was murdered," and added something like, "[h]e needs to burn in hell." She also, at one point, appeared to be saying something to the effect of "why you looking at me," while staring at Rodriguez.

The court then proceeded to inquire where Wilson's mother was seated, and whether other prospective jurors might have heard her statements.

Prospective Juror No. 18 responded that the seat on the immediate other side of Wilson's mother was vacant, with a gentleman sitting on the other side of that seat. He further stated there were people sitting behind them, and remembered someone sitting in front of him, but not in front of Wilson's mother. The court asked about the volume of her voice, and Prospective Juror No. 18 responded that she was "sort of whisper-talk—whispering to me."

Prospective Juror No. 18 added that Wilson's mother then got up and mumbled something, and quickly left. He did not speak to anyone about what she said, and "kept it completely to [him]self."

Defense counsel and the prosecutor also asked follow-up questions. When asked whether he heard anyone else react to the [inflammatory] comment by Wilson's mother, Prospective Juror No. 18 responded, "I didn't notice anything like that." However, later, when Wilson's mother abruptly got up, mumbled something, and left the courtroom, the gentleman on the other side of the vacant seat reacted with a "what's up with her kind of thing," and another prospective juror—who was jokingly providing play-by-play comments—said something like, "I guess that's how you get out of

it . . . you just leave." Prospective Juror No. 18 did not see Wilson's mother talk to anyone other than himself.

The prosecutor and defense counsel stipulated that Prospective Juror No. 18 should be excused, and defense counsel asked for a mistrial. Defense counsel stated it was unclear whether Wilson's mother had spoken to other people and that her behavior had "possibly contaminated [the] jury pool."

The court deferred ruling on the motion and made the following inquiry of all prospective jurors as a group:

"Have any of you been approached by someone, a female, and has that person spoken to you or made any comments to you, about this case, whether you were inside of the courtroom or outside?

"If someone has approached you and talked to you about this case, please raise your hands.

"No hands in the box.

"No hands of any ladies and gentlemen in the audience."

The court then asked the following:

"Have any of you heard any comments about this case, any reference to anyone involved in this case, any reference to the prosecution part of the case, to the defense part of the case? Any person, whether talking about a witness, the defendant, the victim, anyone? Anything that you have heard, even if not directed at you, by someone else other than [defense counsel], [the prosecutor] or the court?

"So the comments that were made in here, it doesn't work. That doesn't apply. If there [are] any comments, anything that you heard from anyone other than the three of us here about this case regarding any of the parties, anything about this case, anything?

"If you have today or yesterday or the day before yesterday—if you have in the last day or so, today, raise your hands, ladies and

gentlemen in the audience and anybody in the audience—I mean in the box or the audience.

"No hands."

The court then admonished the pool that reporting such statements was vital:

"If someone talks to you or attempts to talk to you about this case, you must end the encounter, and you must notify the bailiff immediately, immediately. It is very important. It is critical. [¶] . . . [¶]

"Anyone have second thoughts about what I asked? Anything that comes to mind? If it does, raise your hands.

"No hands of the ladies and gentleman in the box nor in the audience.

"And I am convinced that we have all of the jurors here."

At sidebar, defense counsel expressed concern that the court's comments may have "scared" the jury into believing there had been "some type of witness intimidation." The court disagreed.

Defense counsel then stated that it was known, through Prospective Juror No. 18, that the gentleman two seats over from Wilson's mother did hear her "sort of mumble or say something," but did not raise his hand in response to the court's inquiries—indicating the court's questions were too "abstract" for the jury. The prosecutor commented that, based on Prospective Juror No. 18's statement, it appeared Wilson's mother simply mumbled something prior to leaving which prompted the gentleman to say something like, "[w]hat's her problem"—indicating he didn't hear what she said."

The court denied the motion for mistrial.

After further voir dire, defense counsel exercised three peremptory challenges, and then accepted the panel with 11 out of 20 peremptory challenges remaining.

B. Governing Legal Principles

In carrying out its duty to select a fair and impartial jury, the trial court must conduct an inquiry sufficient to ascertain whether prospective jurors are " 'capable of participating in their assigned function in such fashion as will provide the defendant the fair trial to which he is constitutionally entitled.' " (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1463 (*Martinez*).)

The trial court possesses "broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire." (*People v. Medina* (1990) 51 Cal.3d 870, 889 (*Medina*).) The trial court's conclusion on the question of individual juror bias or prejudice is, likewise, entitled to "great deference." (*Martinez*, *supra*, 228 Cal.App.3d at pp. 1466–1467.)

Accordingly, determinations of either individual or group juror bias will only be reversed on appeal "upon a clear showing of abuse of discretion." (*Martinez*, *supra*, 228 Cal.App.3d at pp. 1466–1467.)

C. Discussion

As respondent correctly observes, because no jury had been sworn and the trial had not yet begun, Rodriguez's motion for "mistrial" was procedurally incorrect. (See *People v. Silva* (2001) 25 Cal.4th 345, 372–373; *People v. Mayfield* (1997) 14 Cal.4th 668, 722, fn. 7 (*Mayfield*).) If Rodriguez's intention was to dismiss the entire jury panel[8] on the grounds they were likely tainted by

---

[8] Although the terms "panel" and "venire" are sometimes

behavior exhibited by Wilson's mother, he should have so moved. (Code Civ. Proc., § 225 [defining classes and types of challenges to prospective jurors, including challenges to the "trial jury panel"]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 805–806 (*Gutierrez*) [applying Code of Civil Procedure section 225 to prospective juror challenge, and noting that under section 1046, "trial juries for criminal actions" are to be "formed in the same manner as trial juries in civil actions"].)

However, assuming the trial court understood Rodriguez's motion as one to quash or dismiss the panel, denial of the motion was well within its discretion.[9]

First, the prospective juror who heard the inflammatory remark by Wilson's mother was excused from jury service. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 925 (*Pinholster*) [no actionable misconduct remained where veniremen who read newspaper article, which could be considered extraneous legal information, were dismissed], disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Second, the prospective juror stated he did not see Wilson's mother speak to anyone else on the jury panel and that she made

---

used interchangeably, the "venire" is the group of prospective jurors summoned from the master eligibility list (*People v. De Rosans* (1994) 27 Cal.App.4th 611, 616, fn. 1), while the "panel" is the group of jurors from the venire "assigned to a courtroom for the purpose of voir dire" (Code Civ. Proc., § 194; *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3).

[9] See *Mayfield*, *supra*, 14 Cal.4th 668, 722, fn. 7 [doubting mistrial motion was proper procedural vehicle to challenge potentially-tainted jury panel, but noting court appears to have correctly treated the motion as one to "quash or dismiss" the venire/panel].)

the remark about her son in a "whispering" tone. He further stated that whatever else she said, prior to abruptly leaving the courtroom, was delivered in a mumbling manner—meaning even he could not discern the content of that statement.

The trial court then proceeded to ask the jury panel whether any one of them had: (1) been approached by a female with any comments about the case; (2) heard someone other than counsel and the court make comments about the case; or (3) heard someone make comments about anyone involved in the case—including comments not specifically directed to their individual attention. Not a single jury panel member responded in the affirmative.

Rodriguez insists that the trial court's failure to question individually prospective jurors seated in the immediate vicinity of Wilson's mother rendered the court's inquiry inadequate—and that this purported inadequacy was an error of constitutional magnitude. The individual questioning of jurors, however, has never been constitutionally required (see *Pinholster*, *supra*, 1 Cal.4th at p. 928), while only an inquiry insufficient to ascertain bias or prejudice will be deemed an abuse of discretion (*ibid.*; *Gutierrez*, *supra*, 45 Cal.4th at p. 806).

To the extent Rodriguez contends the jurors seated near Wilson's mother were clearly "not candid with the court," the assumption is not only speculative, but also illogical in light of the record.[10] The reasonable inference from the factual record is that

---

[10] Rodriguez also asserts jury panel members failed to speak up and acknowledge "they had witnessed [Wilson's mother] speaking to Rodriguez when she came back in the court." There is no record evidence to show that any panel members other than Prospective Juror No. 18 heard Wilson's mother comment to Rodriguez, "why are you looking at me?"

the prospective jurors who "reacted" to her abrupt departure did so based on her physical actions, not the contents of her words.

If, however, defense counsel at trial was so convinced that these prospective jurors heard—or perceived—something which may have impacted their ability to be impartial, he could have (or perhaps did) use his peremptory strikes to dismiss them. As it stands, trial counsel exercised only 9 out of 20 of his peremptory strikes and accepted the final trial jury as constituted. (*People v. Perez* (2018) 4 Cal.5th 421, 445 [failure to exhaust peremptory challenges or express dissatisfaction with final composition of jury, precludes appellate review of failure to excuse prospective juror[s].)[11]

At bottom, Rodriguez's "jury misconduct" claim is based on a series of speculative assumptions supplemented by his assertion that once Prospective Juror No. 18 reported the incident of "misconduct" to the court, a presumption of prejudice attached to the entire jury panel. Even if some type of presumptive prejudice arose at the initial disclosure stage, it was readily dispelled here. *(Pinholster*, *supra*, 1 Cal.App.4th at pp. 924–925 [applying presumption of prejudice to claim of misconduct involving receipt of extraneous information by prospective jurors, but finding any presumption "readily" dispelled given early nature of voir dire proceedings]; *Martinez*, *supra*, 228 Cal.App.3d at pp. 1463–1465

---

[11] Because Rodriguez asserts that the interaction reported by Prospective Juror No. 18 attached a presumption of prejudice to—and/or contaminated the entire jury panel—we address the merits of the claim. (See *Medina*, *supra*, 51 Cal.3d at pp. 888–889 [questioning application of failure-to-exhaust peremptory challenge rule where a defendant complains that entire venire/jury pool was tainted].)

[refusing to apply presumption of prejudice to pretrial bias claim as it would require court to engage in speculation by presuming prospective jurors "were not candid" in their responses, or "irrevocably indoctrinated by the views expressed"]; cf. *Gutierrez*, *supra*, 45 Cal.4th at p. 807 [rejecting claim that trial court's inquiry of a prospective juror contacted by victim's sister was inadequate and noting cases cited by defendant "involved an impaneled jury" whereas the "trial court in the present case excused [the prospective juror] prior to final selection of a jury"].)[12]

II. Admission of Jailhouse Statements

A. Relevant Facts

Before trial, Rodriguez filed a motion seeking to exclude portions of the recorded jailhouse conversation between himself and undercover informants as part of a "*Perkins*" operation.[13]

---

[12] Rodriguez's reliance on *People v. McNeal* (1979) 90 Cal.App.3d 830 (*McNeal*), is misplaced. In *McNeal*, the foreman of the trial jury notified the court that a juror admitted to having some personal knowledge about the case and said it would affect the way she would vote. (*Id.* at p. 835.) When asked if that juror had discussed the information, the foreman responded, " 'to a point,' " and added " '[s]he mentioned a couple of names.' " (*Ibid.*) The court spoke to the identified juror but refused to inquire into the nature of the information, instead focusing on whether she could remain impartial. (*Id.* at p. 836). On appeal, the court held the trial court's failure to ask about the nature of the information prevented an inquiry sufficient to determine if discharge for cause was required. (*Id.* at p. 840.) Here, the facts regarding the improper contact were squarely before the trial court, and the affected [prospective] juror was discharged before trial.

[13] In *Illinois v. Perkins* (1990) 496 U.S. 292, 297 (*Perkins*), the United States Supreme Court held that a conversation between

He did not challenge the *Perkins* operation itself, but identified 28 areas of the transcript for exclusion on the basis of hearsay, relevance, and undue prejudice.[14]

The court addressed each of Rodriguez's individual objections. During argument, in between discussing evidentiary objections to two specific sentences, defense counsel stated:

"[Defense Counsel]: Just for the record, I am making a record that I am objecting on relevance grounds and objecting to hearsay grounds and also objecting on Fifth Amendment grounds and Sixth Amendment grounds.

"[¶] . . . [¶]

"And the reason why I am arguing Fifth Amendment violation is because the detectives arrested my client. They prepared this operation. It took hours. They went and got two informants, put recording devices on them. They held my client separate then put

---

an incarcerated suspect and an undercover agent posing as a fellow inmate did not implicate the concerns underlying *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). The Supreme Court explained that "where a suspect does not know that he is conversing with a government agent," the inherently coercive pressures underlying the *Miranda* rule "do not exist." (*Perkins*, *supra*, 496 U.S. at p. 297; see also *People v. Williams* (1988) 44 Cal.3d 1127, 1141–1142 [stating *Miranda* "has never been applied to conversations between an inmate and an undercover agent"].)

[14] At the outset of the motion, Rodriguez listed a series of Evidence Code sections and added, "[v]iolation of [Rodriguez's] fundamental due process to a fair trial, and 6th Amendment right to cross examine." In the body of the motion, Rodriguez included references to due process and the Sixth Amendment as taglines to challenges directed at specific statements in the transcript.

him in there without reading *Miranda* rights and then started interrogating by approximately—

"The Court: Absolutely positively—you know, [defense counsel], and I know and everybody else knows *Miranda* is not applicable whatsoever here, period. There is a litany of federal cases, state cases. It is a done deal.

"[Defense Counsel]: I am not arguing *Miranda*, Your Honor. I am arguing denial of procedural due process.

"The Court: Okay. Very well.

"[Defense counsel]: Denying my client his fundamental due process as well.

"The Court: Denied.

"[¶] . . . [¶]

"[Defense Counsel]: Can the court state the grounds for the denial to make a clean record when it goes up on appeal they know what the court considers?

"The Court: Well, first of all, it is a *Perkins* violation [*sic*]. The law allows us to—the Supreme Court, federal and state, and all the appellate courts have said that on a *Perkins* operation all of your objections have been made and overruled. There's no *Miranda*, no Fifth Amendment, there's no right of confrontation violation or anything like that. I mean, it is all over the place, period. So your objections are overruled." (Italics added.)

A partially redacted recording of Rodriguez's conversation was played for the jury, and a 41-page transcript was introduced as People's exhibit 20-A.

B. Governing Legal Principles

" '[T]he failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' " (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 (*Kennedy*),

disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458–459; see also *In re Seaton* (2004) 34 Cal.4th 193, 198.) Thus, "[w]hen an objection is made to proposed evidence, the specific ground of the objection must be stated." (*Kennedy*, *supra*, 36 Cal.4th at p. 612.) "The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection." (*Ibid*; Evid. Code, § 353.)

"[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error." (*Kennedy*, *supra*, 36 Cal.4th at p. 612.)

C. The Claims are Forfeited

On appeal, Rodriguez contends the admission of statements from the *Perkins* operation violated his due process rights. In so contending, Rodriguez argues that: (1) the statements should be deemed to fall outside a standard *Perkins* operation, citing language from the concurring opinion in *Perkins*; (2) the statements were coerced and involuntary, citing extensive facts from an unredacted transcript;[15] and (3) the *Perkins* operation conducted in his case

---

[15] A claim a suspect's statements have "actually been coerced" (*Oregon v. Elstad* (1985) 470 U.S. 298, 310–311 (*Oregon*)), or are "involuntary" (*Dickerson v. United States* (2000) 530 U.S. 428, 444 (*Dickerson*), is separate and distinct from a claim that the admission of statements violated the *Miranda* rule. (*Oregon*, at p. 310; *Dickerson*, at p. 444; *Ariz. v. Fulminante* (1991) 499 U.S. 279, 285–286, 287, fn. 3 [examining totality of circumstances to determine whether confession was actually coerced and noting court has used the terms " 'coerced confession' " and " 'involuntary confession' " interchangeably].)

was so " 'close to the rack and screw' " that it constituted outrageous government conduct in violation of his substantive due process rights.

To support his arguments, Rodriguez asks us to augment the record on appeal to include an unredacted 189-page transcript of the jailhouse conversation that was never made part of the record below.

We deny Rodriguez's motion to augment the record, and deem his legal challenges forfeited.

As noted *ante*, footnote 14, trial counsel's written motion shows the Fifth and Sixth Amendment claims were part and parcel of his specific evidentiary challenges. (Cf. *People v. Partida* (2005) 37 Cal.4th 428, 439 [explaining that section 352 probative-vs.-prejudice analysis is subsumed within claim that admission of prejudicial evidence had the additional legal consequence of violating due process]; cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 229–230 & fn. 13 [admission of evidence violates due process if no permissible inference may be drawn from it].)

To the extent trial counsel orally challenged the *Perkins* statements by pointing out Rodriguez was "interrogated" without his "*Miranda* rights," the trial court reasonably understood this to mean counsel was making a Fifth Amendment *Miranda* challenge that was meritless under established authority. (Cf. *People v. Scott* (1978) 21 Cal.3d 284, 290 ["objection will be deemed adequately preserved if, despite inadequate phrasing, record shows court understood the issue presented"].)

On appeal, Rodriguez asserts that his statements during the jailhouse conversation were coerced and involuntary because he was exhausted from lack of sleep and in pain from having been previously shot with a rubber bullet.

The fact that trial counsel thereafter insisted he was not arguing "*Miranda*" but asserting "procedural due process" and "fundamental due process" clarified nothing, while his subsequent request for the trial court to point him to a "particular area" it would like him to address, only highlights why the forfeiture rule should apply here.

It is not the trial court's obligation to identify arguable issues for counsel. Nor is it the trial court's duty to extract facts from the record that might support a viable claim, or reframe the parties' arguments to provide a better chance at success. It is also inappropriate for counsel to toss out umbrella phrases such as "procedural due process" and "fundamental due process," and then demand the trial court make a "clean record" for appeal. (See, generally, *Kennedy*, *supra*, 36 Cal.4th at p. 612.)

Appellate counsel cites numerous legal doctrines while requesting this court to review a transcript which was never admitted in the trial court, but instead redacted to a fraction of its size through item-by-item litigation and concessions among the parties.

On appeal, this court's review is " 'limited to the four corners of the [underlying] record.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1 (*Waidla*).) Accordingly, the claims directed at the statements admitted during the *Perkins* operation are deemed forfeited. (*Kennedy*, *supra*, 36 Cal.4th at pp. 611–612 [failure to object on a coercion theory forfeited claim that coerced testimony was erroneously admitted]; cf. *People v. Debouver* (2016) 1 Cal.App.5th 972, 977–978 [defendant, who argued only in trial court he was too intoxicated to voluntarily waive *Miranda*, forfeited argument statements were the product of police coercion].)

The motion to augment the appellate record with the unredacted transcript is, likewise, denied. (See Cal. Rules of Court, rule 8.155(a); *People v. Bais* (1973) 31 Cal.App.3d 663, 673–674 [matters not made part of record in trial court may not be considered, for any purpose, on appeal]; *People v. Brooks* (1980) 26 Cal.3d 471, 484 [same]; *Muller v. Robinson* (1961) 193 Cal.App.2d 835, 836–837 [same].)

III. Heat of Passion Voluntary Manslaughter Instruction

Towards the end of trial, the trial court discussed jury instructions and applicable defenses with the parties. The court subsequently instructed the jury on the elements of murder, self-defense, imperfect self-defense, and voluntary intoxication.

The court did not instruct the jury as to heat of passion manslaughter, nor did defense counsel request such an instruction.

A. Relevant Law and Standard of Review

A trial court must instruct on lesser included offenses whenever substantial evidence raises a question as to whether all elements of the charged offense are present. (*People v. Avila* (2009) 46 Cal.4th 680, 705 (*Avila*).) "Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

For the instructional duty to arise, there must be substantial evidence " ' "which, if accepted . . . [citation], would absolve [the] defendant from guilt of the greater offense" but not the lesser.' " (*Waidla*, *supra*, 22 Cal.4th at p. 733, italics omitted.) The "substantial evidence requirement is not satisfied by ' "*any*

evidence . . . no matter how weak." ' " (*Avila*, *supra*, 46 Cal.4th at p. 705.)

"A heat of passion theory . . . has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).)

"To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, *supra*, 47 Cal.4th at p. 550.) "[T]he passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

To satisfy the objective component, the claimed provocation must be sufficient to "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection," from passion rather than from judgment. (*Moye*, *supra*, 47 Cal.4th at p. 550; *People v. Beltran* (2013) 56 Cal.4th 935, 942.) " 'The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' " (*Moye*, at pp. 549–550.) A defendant may not " ' "set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused." ' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1215–1216.)

This court reviews "de novo a trial court's failure to instruct on a lesser included offense [citation], and in doing so . . . view[s] the evidence in the light most favorable to the defendant." (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137 (*Millbrook*).)

B. Discussion

It is undisputed that this incident began with Rodriguez insulting Wilson, the victim, while Rodriguez was armed with a

weapon. This, alone, may have barred him from receiving the heat of passion instruction: "A defendant may not provoke a fight, . . . kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 (*Oropeza*).) Thus, a " 'defendant is guilty of murder when he arms himself and plans to insult the victim and then kill him if the victim strikes him in resentment over the insult.' " (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312 (*Johnston*), quoting 2 Wharton's Criminal Law (15th ed. 1994) § 157, p. 352.)

Rodriguez asserts the evidence does not support any inference that he armed himself and *planned* to insult Wilson, but instead that he merely encountered Wilson by coincidence. While this may be true, Rodriguez's jailhouse statements indicate that he had problems with Wilson in the past and that Wilson had previously caught Rodriguez "empty handed." The trial testimony established that Wilson was simply passing through the area when Rodriguez loudly insulted Wilson; when Wilson responded to the insult, Rodriguez calmly "smirked" with his hand on or near his weapon. This evidence was strong indication that Rodriguez seized the opportunity to evoke a reaction out of Wilson to which he could respond with his weapon. (See *Johnston*, *supra*, 113 Cal.App.4th at p. 1312 [" 'If the defendant causes the victim to commit an act which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked,' " quoting 2 Wharton's Criminal Law, *supra*, § 157, p. 352].)

Even assuming Rodriguez's conduct did not categorically preclude an instruction on heat of passion manslaughter, there was

insufficient evidence that he shot Wilson under the actual influence of a strong passion that obscured all reason.

Rodriguez did not take the stand at trial, leaving no direct testimonial evidence from him on his actual or subjective mental state. (*Moye*, *supra*, 47 Cal.4th at p. 557 [noting that defendant provided no direct testimony to support an inference he subjectively harbored strong passions during killing]; *People v. Lee* (1999) 20 Cal.4th 47, 60 ["Adequate provocation and heat of passion must be affirmatively demonstrated."].) Rodriguez's postarrest statements to undercover agents contradict any inference of heat of passion when Rodriguez stated he shot at Wilson while Wilson was "still screaming," "walked away real smooth," and that he "didn't feel anything," and "just had no feelings toward it." *People v. Manriquez* (2005) 37 Cal.4th 547, 585 (*Manriquez*) [no showing defendant "exhibited anger, fury, or rage; thus, there was no evidence that defendant 'actually, subjectively, kill[ed] under the heat of passion' "].)

To the extent Rodriguez points to Alvarez's testimony that, after the shooting Rodriguez sobered up real fast and appeared "very scared," this neither contradicted nor undermined the testimony regarding Rodriguez's state at the time of the shooting. (*Manriquez*, *supra*, 37 Cal.4th at pp. 585–586 [testimony contained no indication that defendant's actions reflected any sign of heat of passion at the time he commenced firing at the victim].)

In addition, to satisfy the second necessary element—objectively reasonable provocation—the defendant's reaction must be caused by the victim and not by his own state of intoxication, trauma, or some other environmental influence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253; *Oropeza*, *supra*, 151 Cal.App.4th at p. 83 ["the fact the defendant is intoxicated or suffers from a mental

abnormality or has *particular susceptibilities to events* is irrelevant in determining whether the claimed provocation was sufficient," italics added].) Wilson's act of taking off his shirt (which revealed he was unarmed) and saying, "come on" would not be sufficient provocation to satisfy the objective standard. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739–740 [insufficient provocation where driver laughed and a backseat passenger looked at him " 'real dirty, like he wanted to fight or something' "]; *Manriquez*, *supra*, 37 Cal.4th at pp. 585–586 [insufficient evidence of provocation where victim repeatedly called defendant a "mother fucker" and taunted him to use his weapon].)

Even if we were to assume that the evidence required the instruction, Rodriguez would be unable to clear the final hurdle—demonstrating that any such error was prejudicial.

The evidence presented during the defense case primarily turned on the theory that Rodriguez's past trauma of having been assaulted or threatened at gun point and/or his prior interactions with Wilson, made Rodriguez more "hypervigilant" and quick to react out of fear or a perceived threat.

In rejecting both self-defense and imperfect self-defense, the jury disbelieved that Rodriguez harbored an actual fear of imminent harm. (See *People v. Humphreys* (1996) 13 Cal.4th 1073, 1083.) Once it rejected these claims, there was "little if any independent evidence remaining to support his further claim that he killed in the heat of passion." (*Moye*, *supra*, 47 Cal.4th at p. 557.) There was, however, eyewitness evidence that Rodriguez shot Wilson twice and then, as Wilson was clutching his stomach and crying for help, fired twice more at him with his arm lowered at a 45-degree angle; the autopsy report revealed gunshot wounds in Wilson's chest, stomach, right arm, *and* back. (Cf. *People v. Cruz*

(2008) 44 Cal.4th 636, 665 [shot fired at defenseless victim in the back negated any possible prejudice from failure to instruct on provocation/heat of passion].) Finally, the fact that the jury expressly found that Rodriguez premeditated and deliberated the murder is a significant corroborative, if not dispositive, factor in our determination. (See *People v. Wharton* (1991) 53 Cal.3d 522, 572 [failure to instruct on heat of passion was harmless since finding of premeditation was "manifestly inconsistent with having acted under the heat of passion"]; but see *People v. Franklin* (2018) 21 Cal.App.5th 881, 892–894 [observing tension in case law regarding whether jury's finding of premeditation means it "necessarily decided" defendant was not acting out of heat of passion].)[16]

---

[16] We would reach the same conclusion whether prejudice is measured under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)), or under federal constitutional law (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)). (See, generally, *People v. Wright* (2015) 242 Cal.App.4th 1461, 1495, fn. 14 [noting Courts of Appeal are currently debating whether the erroneous failure to instruct on provocation/heat of passion manslaughter is evaluated for prejudicial error under *Watson* or *Chapman*]; *Millbrook*, *supra,* 222 Cal.App.4th at pp. 1143–1146 [same]; see also *People v. Thomas* (2013) 218 Cal.App.4th 630, 633–634 [addressing error under *Chapman* after matter remanded by California Supreme Court to determine whether failure to instruct on heat of passion manslaughter constituted federal constitutional error; Court of Appeal noted defendant raised federal aspect of issue]; *Moye*, *supra*, 47 Cal.4th at p. 558, fn. 5 [limiting analysis to *Watson* test where defendant failed to "clearly" raise and "fully" brief federal aspect of claim and argue for application of *Chapman*].) In his opening brief, Rodriguez asserts the instructional error was of both state and federal dimension and prejudicial under either state or federal law, but adds this court is bound by California Supreme

IV. Cumulative Error

Rodriguez contends the cumulative effect of the errors alleged denied him due process and compels reversal. In light of our disposition, there are not multiple errors to accumulate. (*People v. Trinh* (2014) 59 Cal.4th 216, 253; *People v. Woodruff* (2018) 5 Cal.5th 697, 783.)

V. Victim Restitution Amount

A. Relevant Facts

At sentencing, the trial court orally pronounced an award of $5,000 in restitution:

"The Court: So what is the amount of restitution in this case?

"[Prosecutor]: It's $5,000 to the Victim Compensation Board. I believe that that was an amount that was provided for funeral and burial costs.

"The Court: Is that the total restitution, madam?

"[Prosecutor]: That is my understanding, . . . they submitted bills, and so then this is the amount that was paid.

"The Court: Very well. That's the total amount?

"[Prosecutor]: Yes.

"The Court: [Defense counsel], your client has a right to have a restitution hearing if he wishes to or just stipulate to the amount.

"[Defense counsel]: I have reviewed the amount with him, and we—He has agreed to stipulate to that amount.

"The Court: Very well. Pursuant to the stipulation, there is a $5,000 restitution amount to be paid to the victim—California Victim Compensation Board through the Department of Corrections."

Court precedent which holds the error is "purely one of state law."

The court did not orally impose any interest on the restitution award. In contrast, the minute order and abstract of judgment state the restitution amount as "$5,000 plus 10% interest from the date of sentence."

Rodriguez asserts that because the trial court failed expressly to order the imposition of interest on the restitution amount, any award of interest must be struck from the abstract of judgment. We disagree.

B. Governing Legal Principles

As a general rule, "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

A sentence without an award of victim restitution, or an award without a required restitution element, is deemed unauthorized and invalid. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225–1226 (*Brown*).) A claim that a sentence is unauthorized "may be raised for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) The reviewing court may correct an unauthorized sentence by ordering the abstract of judgment be modified. (*People v. Vieira* (2005) 35 Cal.4th 264, 294; § 1260.)

C. Discussion

The California Constitution requires victim restitution in all criminal cases. (Cal. Const., art. I, § 28, subd. (b)(13).) The Legislature has further mandated the imposition of interest on every award of victim restitution. (§ 1202.4, subd. (f)(3)(G); *People v. Wickham* (2013) 222 Cal.App.4th 232, 238 [under

section 1202.4, subdivision (f)(3)(G) victim restitution order "*must* fully reimburse the victim for every economic loss caused by the defendant's criminal conduct, *including 10 percent interest*"].)

Rodriguez insists the award of any interest is within the discretion of the trial court because subdivision (f)(3)(G) concludes with the phrase, "as determined by the court." That phrase, however, relates to the determination of whether to accrue the 10 percent rate from the date of the loss, or the date of sentencing; it does not make the interest award itself discretionary. (See *People v. Pangan* (2013) 213 Cal.App.4th 574, 581 (*Pangan*) [interest "*has* to be factored into the award," italics added].)

The purpose of imposing interest is to secure immediate payment of restitution. (*Pangan*, *supra*, 213 Cal.App.4th at p. 581.) Absent a specific determination that the date of loss occurred earlier, the presumption is that interest will accrue from the time of the restitution order. (*Id.* at p. 581, fn. 7.)

Here, restitution was ordered at the sentencing hearing and the abstract of judgment reflects that interest on the restitution amount shall accrue from the date of sentencing. Though the trial court did not expressly impose interest when pronouncing its restitution order, a judgment without the requisite interest award is subject to correction on appeal. (*Brown*, *supra*, 147 Cal.App.4th at p. 1225; § 1260.)

As such, and commensurate with our authority under section 1260, we modify the judgment to reflect the restitution amount as it is set out in the abstract of judgment.[17]

---

[17] Leaving intact the imposition of 10 percent interest from the date of the sentencing not only maintains the legality of the sentence, but also results in the least costly calculation of interest to Rodriguez.

VI. Conduct Credits

At sentencing, Rodriguez received a total of 1,075 days of presentence custody credit: 935 actual days, plus 140 days of conduct credit. The 140 days were calculated at a rate of 15 percent of the [actual] 935 days and imposed pursuant to section 2933.1.

As respondent correctly points out, however, Rodriguez, is statutorily prohibited from earning conduct credits. (See *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366 [defendants convicted of murder entitled to presentence credits for *actual time* served, but ineligible for presentence *conduct* credits]; §§ 2933.1, 2933.2); *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1431–1432 [modifying abstract to delete award of conduct credit to defendant convicted of murder].) Accordingly, we order the requisite modification be made to delete the award of conduct credits. (Cf. *People v. Sanders* (2012) 55 Cal.4th 731, 742, fn. 13 [appellate court can correct legal error resulting in unauthorized sentence at any time].)

DISPOSITION

The judgment is modified to reflect the imposition of direct victim restitution in the amount of $5,000 plus 10 percent interest from the date of the sentencing (as reported in the original abstract of judgment) and to strike the award of 140 days of conduct credit. The judgment is affirmed in all other respects.

The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.